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40 CFR Ch. I (7–1–11 Edition)

(j) In the event that the Director neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Secretary shall process the permit application.

[53 FR 20776, June 1, 1988; 53 FR 41649, Oct. 24, 1988]

§ 233.51 Waiver of review.

(a) The MOA with the Regional Administrator shall specify the categories of discharge for which EPA will waive Federal review of State permit applications. After program approval, the MOA may be modified to reflect any additions or deletions of categories of discharge for which EPA will waive review. The Regional Administrator shall consult with the Corps, FWS, and NMFS prior to specifying or modifying such categories.

(b) With the following exceptions, any category of discharge is eligible for consideration for waiver:

- (1) Draft general permits;
- (2) Discharges with reasonable potential for affecting endangered or threatened species as determined by FWS;
- (3) Discharges with reasonable potential for adverse impacts on waters of another State;
- (4) Discharges known or suspected to contain toxic pollutants in toxic amounts (section 101(a)(3) of the Act) or hazardous substances in reportable quantities (section 311 of the Act);
- (5) Discharges located in proximity of a public water supply intake;
- (6) Discharges within critical areas established under State or Federal law, including but not limited to National and State parks, fish and wildlife sanctuaries and refuges, National and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.

(c) The Regional Administrator retains the right to terminate a waiver as to future permit actions at any time by sending the Director written notice of termination.

§ 233.52 Program reporting.

(a) The starting date for the annual period to be covered by reports shall be established in the Memorandum of

Agreement with the Regional Administrator (§ 233.13.)

(b) The Director shall submit to the Regional Administrator within 90 days after completion of the annual period, a draft annual report evaluating the State's administration of its program identifying problems the State has encountered in the administration of its program and recommendations for resolving these problems. Items that shall be addressed in the annual report include an assessment of the cumulative impacts of the State's permit program on the integrity of the State regulated waters; identification of areas of particular concern and/or interest within the State; the number and nature of individual and general permits issued, modified, and denied; number of violations identified and number and nature of enforcement actions taken; number of suspected unauthorized activities reported and nature of action taken; an estimate of extent of activities regulated by general permits; and the number of permit applications received but not yet processed.

(c) The State shall make the draft annual report available for public inspection.

(d) Within 60 days of receipt of the draft annual report, the Regional Administrator will complete review of the draft report and transmit comments, questions, and/or requests for additional evaluation and/or information to the Director.

(e) Within 30 days of receipt of the Regional Administrator's comments, the Director will finalize the annual report, incorporating and/or responding to the Regional Administrator's comments, and transmit the final report to the Regional Administrator.

(f) Upon acceptance of the annual report, the Regional Administrator shall publish notice of availability of the final annual report.

§ 233.53 Withdrawal of program approval.

(a) A State with a program approved under this part may voluntarily transfer program responsibilities required by Federal law to the Secretary by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

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(1) The State shall give the Administrator and the Secretary 180 days notice of the proposed transfer. The State shall also submit a plan for the orderly transfer of all relevant program information not in the possession of the Secretary (such as permits, permit files, reports, permit applications) which are necessary for the Secretary to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator and the Secretary shall evaluate the State's transfer plan and shall identify for the State any additional information needed by the Federal government for program administration.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of transfer in the FEDERAL REGISTER and in a sufficient number of the largest newspapers in the State to provide statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA, Corps and State mailing lists.

(b) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

(1) When the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) When the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed, or to implement alternative enforcement methods approved by the Administrator; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 233.13.

(c) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program:

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on the Administrator's initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in subsection (b) of this section. The Administrator shall respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal review of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing, shall specify the allegations against the State which are to be considered at the hearing, and shall be published in the FEDERAL REGISTER. Within 30 days after publication of the Administrator's order in the FEDERAL REGISTER, the State shall admit or deny these allegations in a written answer. The party seeking withdrawal of the State's program shall have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definition of *Administrative Law Judge, Hearing Clerk, and Presiding Officer* in 40 CFR 22.03 apply in addition to the following:

(i) *Party* means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) *Person* means the Agency, the State and any individual or organization having an interest in the subject matter of the proceedings.

(iii) *Petitioner* means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.* (i) The following provisions of 40 CFR Part 22 [Consolidated Rules of Practice] are applicable to proceedings under this paragraph:

(A) Section 22.02—(use of number/gender);

(B) Section 22.04—(authorities of Presiding Officer);

(C) Section 22.06—(filing/service of rulings and orders);

(D) Section 22.09—(examination of filed documents);

(E) Section 22.19 (a), (b) and (c)—(pre-hearing conference);

(F) Section 22.22—(evidence);

(G) Section 22.23—(objections/offers of proof);

(H) Section 22.25—(filing the transcript; and

(I) Section 22.26—(findings/conclusions).

(ii) The following provisions are also applicable:

(A) Computation and extension of time.

(1) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day.

(2) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (i) upon timely motion of a party to the proceeding, for good cause shown and after consideration of prejudice to other parties, or (ii) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be

filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(3) The time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator.

(B) *Ex parte* discussion of proceeding. At no time after the issuance of the order commencing proceedings shall the Administrator, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decisions on the case, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

(C) *Intervention—(1) Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (b)(3)(ii)(C)(3) of this section, within ten (10) days after service of the motion for leave to intervene.

(2) However, motions to intervene must be filed within 15 days from the date the notice of the Administrator's

order is published in the FEDERAL REGISTER.

(3) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (i) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (ii) the movant will be adversely affected by a final order; and (iii) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(4) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

(D) *Motions—(1) General.* All motions, except those made orally on the record during a hearing, shall (i) be in writing; (ii) state the grounds therefore with particularity; (iii) set forth the relief or order sought; and (iv) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph (b)(4) of this section.

(2) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the dis-

position of motions as they deem appropriate.

(3) *Decision.* The Administrator shall rule on all motions filed or made after service of the recommended decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

(4) *Record of proceedings.* (i) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(ii) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 1200 Pennsylvania Ave., NW., Washington, DC 20460;

(iii) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involve matters of substance;

(iv) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(v) A copy of each such submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(vi) Every submission shall be accompanied by acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service; and

(vii) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(5) *Participation by a person not a party.* A person who is not a party may,

in the discretion of the Presiding Officer, be permitted to make a limited appearance by making an oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(6) *Rights of parties.* (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and pre-hearing proceedings;

(B) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision.* (i) Within 30 days after the filing of proposed findings and conclusions and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties, and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator.* (i) Within 60 days after certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the Act and this part, his decision shall constitute "final agency action" within the meaning of 5 U.S.C. 704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the Act and regulations, he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as

required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the state fails to take appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S. 704.

(d) Withdrawal of authorization under this section and the Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions taken by the State prior to withdrawal.

[53 FR 20776, June 1, 1988, as amended at 57 FR 5346, Feb. 13, 1992]

Subpart G—Eligible Indian Tribes

SOURCE: 58 FR 8183, Feb. 11, 1993, unless otherwise noted.

§ 233.60 Requirements for eligibility.

Section 518(e) of the CWA, 33 U.S.C. 1378(e), authorizes the Administrator to treat an Indian Tribe as eligible to apply for the 404 permit program under section 404(g)(1) if it meets the following criteria:

(a) The Indian Tribe is recognized by the Secretary of the Interior.

(b) The Indian Tribe has a governing body carrying out substantial governmental duties and powers.

(c) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for the Indians, held by a member